INDEX

	Page
STATEMENT OF THE CASE	1
A. The Riffe Trusts	2
B. The Anco Commission	4
ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	5
CONCLUSION	10

CITATIONS

Cases:

Byer v. International Paper Co., 314 F.2d 831	8
Cowell v. McMillin, et al., 177 Fed. 25	5, 6, 8, 9
Knox Glass Bottle Co. v. Underwood, 89 So.2d 799	7
Pratt v. Shell Petroleum Corp., 100 F.2d 833	8
Twin Lick Oil Co. v. Marbury, 91 U. S. 587	9

Miscellaneous:

U. S. Supreme Court Rule 19(b)	5, 10
U. S. Supreme Court Rule 56.-4.	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 184

L. E. RIFFE, *Petitioner*

v.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Wilshire believes that the Statement of the Case presented in Petitioner Riffe's Petition should be expanded with the addition of certain important details, helpful to an understanding of this case.

Therefore, adding to what appears on pages 3 to 7, inclusive, of the Petition, Respondent Wilshire states as follows:

In May, 1962, Petitioner Riffe executed an affidavit for Respondent Wilshire which purported to set out what his relationship with Redstone was and what it was expected

to be in the future. He stated in the said affidavit that his only interest in the Redstone-Cities Service contract would be as a guarantor. He further stated that he was not a stockholder of Redstone, nor did he have any arrangements whereby he would receive any of the profits which Redstone might receive under its agreement with Cities Service. He further stated in the affidavit that his only interest in Redstone "monetarily or otherwise, is as a guarantor of Redstone's contract with Cities Service and its loan secured for the construction and equipment of an asphalt plant. . . ." He went on in the affidavit to aver that he would not do anything nor permit anything to be done by reason of his guarantee of Redstone's obligations which would in anyway "jeopardize, interfere, or restrict in any manner whatsoever, his duties to Riffe Petroleum Company, a division of Wilshire, and that he shall continue to faithfully and diligently perform such duties required of him as an officer, director and stockholder of Wilshire." (Record, 67, 304, 305)

The plant construction by Redstone was delayed (during year 1962), but it purchased asphalt for sale to its customers from Wilshire at a reduced price; arranged for it by Petitioner Riffe (R. page 110). As the United States Court of Appeals for the Tenth Circuit observed in its Opinion and Decision (page 19, Appendix to Petitioner Riffe's Petition), "It was apparent that Redstone was intended to be a competitor of Wilshire and would become such competitor when it first commenced the sale of asphalt to its customers."

A. THE RIFFE TRUSTS

Near the end of May, 1962, Petitioner Riffe and his wife executed six separate trust instruments, creating a separate trust for each of their six daughters, respectively. The two trustees at the time the trusts were first created were O. Homer Riffe, a brother of Petitioner Riffe, and David Thorn-

ton, Mr. Riffe's attorney (and still his attorney in this case). The trust instruments recited that Petitioner Riffe and his wife had transferred to the trusts certain properties listed on Schedule A, attached to the trust instruments. The record indicates that the first schedule was apparently prepared about the time the trusts were created in May, 1962. On this schedule are listed, for each of the six trusts, 150 shares of Redstone stock; an interest in a commission contract between another defendant in this action, A. V. Murray, and Anco Manufacturing Company (which constructed the asphalt plant); and, in addition, certain other properties and interests, which are not any longer an issue in this case. (R. 143-149, 320-322)

The six trusts collectively held 30% of the total issued and outstanding stock of Redstone. The record also shows that Wilshire had no knowledge of the fact that these stocks were in the family trusts of Mr. Riffe, the Petitioner herein.

As stated in Petitioner's Statement of the Case, the said stock found its way into the trusts by reason of a sale by A. V. Murray, a previous defendant, of the said stock to the trustees. In connection with the transfer of the stock to the trusts, A. V. Murray dealt with an attorney for a certain bank in Tulsa, which became a trustee of the trusts about a year later (1963) (R. pages 143, 146, 239, 245). The record shows that Petitioner Riffe participated in negotiations and made various contacts relative to the possible sale of Redstone from and after the time Redstone made its contract with Cities Service (R. pages 246-249, 201-203).

By a written representation dated November 1, 1962, Petitioner Riffe unequivocally stated to Respondent Wilshire that neither he nor any relative owned 10% or more of the stock of any company engaged in a similar line of business as Wilshire. This statement was made at the same time that 30% of the Redstone stock was owned by Peti-

tioner Riffe's daughters' trusts (R. pages 333-335). The statement was made despite the existence of Petitioner Riffe's employment contract with Wilshire (R. pages 18-21); (Petitioner's Petition, page 4). The record further shows that some time after the written representation of November 1, 1962 and apparently in December, 1962, the Redstone stock held by the Riffe Trusts was sold to Inland, Inc., along with all the rest of the stock in Redstone. The company purchasing the said stock required, as a condition of its purchase of the entire stock, that there be a marketing agreement whereby the Riffe Division of Respondent Wilshire would be compelled to market the production of asphalt from the refinery which was built and owned by Redstone and subsequently sold to the said purchaser (Inland, Inc.) (R. pages 36, 43). Petitioner Riffe negotiated and bound Respondent Wilshire to such a marketing agreement.

Thereafter, new schedules were attached to the trusts of Petitioner Riffe's children, and a Tulsa bank became one of the new trustees. The new schedules showed ownership of proceeds received in the sale of the Redstone stock to Inland, Inc., together with other properties and interests, including proceeds from a commission (mentioned below) received by A. V. Murray from Anco Manufacturing Company for recommending Anco to construct the Redstone refinery (R. pages 322, 324, 325).

B. THE ANCO COMMISSION

In addition to the Redstone stock which found its way into Petitioner Riffe's trusts in 1962, A. V. Murray (a co-defendant with Riffe in the trial of this action) caused to be given to the Riffe trusts one-half of a commission which he had secretly obtained from the Anco Manufacturing Company because of recommending Anco to construct the Redstone refinery in Ponca City, Oklahoma. The commission

was in the amount of $16,050.00, and Murray gave exactly one-half, or $8,025.00, to Petitioner Riffe's trusts for his children (R. 238). The record shows that Petitioner Riffe was fully aware of this fact. The fact was not disclosed in any way to Respondent Wilshire, or its officers or directors (R. pages 304, 333). A. V. Murray and R. L. Felts (co-defendants of Petitioner Riffe at trial) admitted that Redstone was a competitor in the asphalt business with Respondent Wilshire from the time it was created until and after the time it was sold to Inland, Inc. (R. pages 118, 119, 99-143, incl.; 207-250, incl.).

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner Riffe, through his counsel, claims that this court should allow his Petition for a Writ of Certiorari upon a single ground only, to wit:

That the United States Court of Appeals for the Tenth Circuit has reached a conclusion in this case contrary to a decision of the United States Court of Appeals for the Ninth Circuit (e.g. *Cowell v. McMillin, et al.*, 177 Fed. 25; CCA, 9th (1910)).

Petitioner Riffe admits on page 3 of his Petition that this case does not involve any constitutional provisions, treaties, statutes, ordinances, or regulations. Apparently, Petitioner Riffe is attempting to invoke the jurisdiction of this Court under the provisions of Supreme Court Rule 19(b), as to that part which reads: "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . ."

Unfortunately for Petitioner Riffe, there is no conflict between the Ninth and Tenth Circuits with respect to the subject matter of the instant case.

Respondent Wilshire desires to state at the outset that it

agrees thoroughly with the holding in the Ninth Circuit decision in *Cowell v. McMillin,* et al., 177 Fed. 25 (1910), upon which Petitioner Riffe relies. *Cowell v. McMillin* has not been cited in any decision since 1953 (see Volume 2, Shepard's Citations), but it announces basic and settled law with respect to the fact situation involved in that case.

The fact situation in *Cowell v. McMillin* is completely different from the fact situation in the case at bar. Petitioner Riffe's reliance upon a so-called "corporate opportunity doctrine" cannot rescue him from the holding of the Tenth Circuit that Petitioner Riffe not only violated the plain terms of his employment contract with Respondent Wilshire, but he also violated his fiduciary and other duties as an officer and director of Wilshire. Actually, the corporate opportunity doctrine has little or nothing to do with the reasoning and conclusions of the decision in this case entered by USCA, 10th, below.

The main distinction in the facts as between *Cowell v. McMillin* on the one hand and the case at bar on the other is that of secrecy. A second distinction is that Redstone was a competitor of Respondent Wilshire; the element of competition was lacking in the facts of *Cowell v. McMillin.*

In *Cowell v. McMillin,* the principal defendant, McMillin, dealt with his company strictly in the open. Moreover, he entered into written agreements with his company which had definite long-term benefits for the company, and which involved another company which was not in any way a competitor of the first company. In the instant case, Petitioner Riffe dealt only in secret, never revealing his direct and indirect ownership of Redstone Asphalt and Petroleum Company to Respondent Wilshire, and, in fact, making written representations by affidavit and otherwise in May and in December, 1962 that he did not have any monetary or other interests through himself or through relatives. Moreover, the record shows, as set forth in the Statement of the

Case herein, that Redstone from the time of its creation was a competitor of Respondent Wilshire. The record further shows that Petitioner Riffe, though a top officer and director of Respondent Wilshire, did everything he could to nurture the growth of his company's competitor, Redstone, all for his ultimate benefit and profit, clandestinely realized.

Petitioner Riffe maintained a constant contact with the competitive corporation, Redstone, and participated from time to time in negotiations concerning its business and its ultimate sale to Inland, Inc. He even participated in other potential sales to other companies, which did not materialize (R. pages 201-203).

Petitioner Riffe has maintained throughout this case that he did not have a personal interest in Redstone, but rather that six "irrevocable" trusts were established by him and his wife for their six daughters, and that the trusts held the interests.

Had Petitioner Riffe owned the Redstone stock directly in his name, there would be no question, as the Tenth Circuit observed, that such ownership would constitute a violation of his employment contract and of his fiduciary position as an officer and director of Respondent Wilshire. It makes no difference that the stock was held in some kind of family trusts. Petitioner Riffe should not be able to accomplish indirectly what he was plainly prohibited by his employment contract and by reasons of his position as director and officer from doing directly. In any event, the ownership of the stock by the trusts was contrary to the affidavit he executed in May, 1962 and the written representations made by him on November 1, 1962. Even assuming that the trusts were valid, and in fact were irrevocable as Petitioner Riffe claims, they did not insulate him from liability for the breach of his fiduciary duty to the Respondent Wilshire corporation. (See *Knox Glass Bottle Co. v. Underwood*, 89 So.2d 799.)

Among other decisions, USCA, 10th Cir. in this case applied *Byer v. International Paper Co.*, 314 F.2d 831 (10th Cir.) and *Pratt v. Shell Petroleum Corp.*, 100 F.2d 833 (10th Cir.) to the facts in this case. Both the *Byer* and the *Pratt* cases should be determinative of the issues presented herein.

In contrast to the clandestine and wrongful acts committed by Petitioner Riffe as against Respondent Wilshire, let us look at the essential facts of *Cowell v. McMillin*, upon which Petitioner Riffe relies. The opinion in the case is somewhat lengthy, but the contrast between it and *Riffe v. Wilshire* can easily be shown by a succinct reference to its facts. They are as follows:

Defendant McMillin was president, general manager and a director of a lime company in the state of Washington. The principal facts arose in the years commencing in about 1890, and thereafter. Defendant McMillin contracted individually for the exclusive license in the State of Washington of a patented barrel-making machine. This was done with the knowledge and consent first given by the lime company and its directors. The lime company, by unanimous vote of the other directors, Defendant McMillin not voting, leased the lime company's barrel-making plant, and contracted with McMillin to furnish all the barrels required in its business at a stated price. Defendant McMillin installed one of the patented machines in the plant, and by a written agreement, renewed from time to time, furnished barrels to the lime company for a number of years at a profit. Defendant McMillin did not, at the time of the original contract for furnishing barrels, own a controlling interest in the lime company nor did he control the other directors, each of whom owned a considerable amount of stock. Moreover, the patented machine was first offered to the lime company, was discussed by its directors and Defendant McMillin strongly urged that the lime company secure the

license for the said machine. The other directors were doubtful about the effectiveness of the machine, and refused to risk the lime company's money for the experiment. They did acquiesce, with full knowledge, in the acquisition of the license to use the patented barrel-making machine by Defendant McMillin. At the time they entered into the contract with Defendant McMillin to furnish barrels for the lime company, the directors had as much knowledge about the patented machine as Defendant McMillin did; but they did not share his confidence in its successful operation. The contract price of the barrels furnished by Defendant McMillin to the lime company was less than the average cost for barrels previously paid by the company.

The Court in *Cowell v. McMillin* held that under such facts, recited above, the contract and lease involving Defendant McMillin for making barrels for the lime company, were not fraudulent nor illegal, but fair and valid. The Court said at page 39 of 177 Federal Reporter:

> "Thus, the case is brought within the rule recognized by the Supreme Court of the United States, namely, that where the director has acted with that candor and fairness which equity imposes as the guide for dealing between him and the corporation, and the transaction is open and free from blame, the director is not forbidden from making a contract with the corporation, or from entering upon a transaction in which he is personally interested. Twin Lick Oil Co. v. Marbury, 91 U.S. 587, 23 L.Ed. 328."

We repeat. Respondent Wilshire and its counsel are in full accord with the holding in *Cowell v. McMillin*. It is obvious from the contrast of the facts, as between *Cowell v. McMillin* on the one hand and this case of Riffe v. Wilshire on the other, that the *Cowell* case has no applicability to the "Question Presented For Review" on page 3 of Petitioner Riffe's Petition.

It is obvious also that Petitioner Riffe should not be permitted to invoke the jurisdiction of the Supreme Court of the United States under the provisions of Supreme Court Rule 19(b).

CONCLUSION

Respondent Wilshire respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Moreover, Respondent Wilshire prays that this Honorable Court adjudge to Respondent reasonable damages for the delay occasioned by Petitioner Riffe's filing for a writ of certiorari herein, for the reason that there appears to be no ground for granting such a writ, and that it has been filed for delay only. This prayer is made under the provisions of Supreme Court Rule 56.4.

Respectfully submitted,

RICHARD H. SHAW
1500 Denver United States National Bank Center
1700 Broadway
Denver, Colorado 80202
Tel. 303 - 292-1650

Attorney for Wilshire Oil Company of Texas, Respondent.